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Sectors in Developing Countries - Shipping
Joint UNCTAD/IMO Intergovernmental Group
of Experts on Maritime Liens and
Mortgages and Related Subjects
Seventh session
Geneva, 5 December 1994
Item 3 of the provisional agenda

CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

Consideration of the review of the 1952 Convention on Arrest of Sea-Going Ships

Note by the UNCTAD secretariat

The attached report (JIGE(VII)/2)* has been prepared for the seventh session of the Joint Intergovernmental Group, in response to the recommendation of the UN/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages.

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UNCTAD/IMO

JIGE(VII)/2

Joint Intergovernmental
Group of Experts on Maritime Liens
and Mortgages and Related Subjects
Seventh session
Geneva, 5 December 1994
Item 3 of the provisional agenda

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CONSIDERATION OF THE REVIEW OF THE 1952 CONVENTION ON ARREST OF SEA-GOING SHIPS

Note by the secretariats of UNCTAD and IMO

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JIGE(VII)/2

I. BACKGROUND AND INTRODUCTION

1. The Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects was established jointly by the United Nations Conference on Trade and Development (UNCTAD) and the International Maritime Organization (IMO). 1/ The mandate of the Joint Intergovernmental Group of Experts (JIGE), as approved by the two organizations, included the possible consideration of "the review of the maritime liens and mortgages Conventions and related enforcement procedures, such as arrest".

2. The JIGE, at its sixth session, having completed the final reading of the draft articles for a convention on maritime liens and mortgages, also held an exchange of views concerning the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (hereinafter referred to as the Arrest Convention). The JIGE had before it a document prepared by the secretariats entitled "Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952". The JIGE agreed that it might be necessary to amend the Arrest Convention in the light of the decisions taken in respect of the draft maritime liens and mortgages convention. It was, however, considered that, in view of the close relationship between the two Conventions, preparation of any amendment of the Arrest Convention had to be postponed until after the adoption of the Convention on Maritime Liens and Mortgages by a diplomatic Conference. 3/

3. In May 1993, the United Nations/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages, having adopted the International Convention on Maritime Liens and Mortgages, 1993, adopted a resolution in which it recommended that "the relevant bodies of UNCTAD and IMO, in the light of the outcome of the Conference, reconvene the Joint Intergovernmental Group with a view to examining the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952, and invite the secretariats of UNCTAD and IMO,

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1/ See resolution 6(XI) of the UNCTAD Working Group on International Shipping Legislation, endorsed by the UNCTAD Trade and Development Board at its thirty-second session and by the IMO Council at its fifty-sixth session.

2/ Document JIGE(VI)/3 issued by UNCTAD under cover of TD/B/C.4/AC.8/22 and by IMO under cover of LEG/MLM/22.

3/ For the recommendation of the Joint Group, see the final report of the JIGE, document JIGE(VI)/8, TD/B/C.4/AC.8/27, LEG/MLM/27, para 16.

in consultation with relevant non-governmental organizations, such as the Comité Maritime International, to prepare the necessary documentation for the meetings of the Group". 4/

4. The recommendations contained in the resolution were endorsed by the UNCTAD Trade and Development Board at its fourth (pre-sessional) Executive Session and by the IMO Assembly at its eighteenth session.

5. This note has been prepared by the UNCTAD and IMO secretariats, in consultation with the CMI, in response to the above resolution. It attempts to update the study contained in document JIGE(VI)/3 (TD/B/C.4/AC.8/22 - LEG/MLM/22) concerning the scope of the revision of the Arrest Convention 1952. It highlights, inter alia, some of the changes to the Arrest Convention which might be necessary as a result of the adoption of the International Convention on Maritime Liens and Mortgages, 1993.

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4/ See the report of the UN/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages (A/CONF.162/8), annex I.

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II. OUTLINE OF POSSIBLE MODIFICATIONS TO THE 1952 CONVENTION ON ARREST OF SEA-GOING SHIPS

A. Article 1 - Claims in respect of which a vessel may be arrested

6. More detailed discussion concerning the amendments which might be desirable in respect of Article 1 is contained in the previous report of the UNCTAD and IMO secretariats on the subject (JIGE(VI)/3). 5/ This note focuses on the changes which might be required in the light of the adoption of the new International Convention on Maritime Liens and Mortgages, 1993.

7. Article 1 of the Convention provides for a list of maritime claims which give rise to a right of arrest. Article 1 has often been criticized as being incomplete and outdated. 6/ Suggestions have been made to extend the list to include other maritime claims such as claims for unpaid insurance premiums, stevedoring charges, agency fees, etc., or alternatively that some general wording should be devised to allow arrest for all claims in connection with the operation, ownership and management of a ship. 7/

8. The approach adopted by the Arrest Convention would probably be in conflict with Article 6 of the International Convention on Maritime Liens and Mortgages, 1993 (hereinafter referred to as the 1993 MLM Convention). According to Article 6, States Parties may, under national law, grant other maritime liens on a vessel to secure claims other than those provided for in Article 4. It is therefore conceivable that the law of a State Party to the 1993 MLM Convention, which grants maritime liens other than those listed in Article 4(1), be applied in a State Party to the Arrest Convention and that

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5/ Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952, document JIGE(VI)/3, TD/B/C.4/AC.8/22, LEG/MLM/22, (hereinafter referred to as JIGE(VI)/3), pp 5-9.

6/ See JIGE(VI)/3, p 6: Berlingieri on Arrest of Ships, A Commentary on the 1952 Arrest Convention, published under the auspices of the CMI, Lloyd's of London Press Ltd, 1992, p 51: "In general, a closed list is dangerous, for it is unlikely to be complete or, in any event to continue to be complete in the light of new developments".

7/ See JIGE(VI)/3, p 6; summary of the debates at the CMI Lisbon Conference, Lisboa II, 1985, pp 126-127.

maritime liens under the 1993 MLM Convention and the fact that they are subject to a short extinction rule, provide a further argument in favour of inclusion of a general wording within the list of maritime claims.

9. The CMI Draft Revision of the 1952 Arrest Convention (hereinafter referred to as the CMI Draft), adopted a mixed approach providing for definition of the term "maritime claim", together with general words which are followed by an extended list of maritime claims as examples. The opening sentence of Article 1, paragraph (1) provides:

> "(1) 'Maritime claim' means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or a 'hypothèque' or a charge of the same nature on any ship, or out of salvage operations relating to any ship, such as any claim in respect of ..."

10. The term "such as" is used in order to introduce an element of ejusdem generis and to limit maritime claims to those similar to the categories exemplified in the list of claims. The proposal to replace the list by a general clause covering all claims in connection with the ownership, operation and management of a ship was not accepted. It was considered that a general clause would give rise to different interpretations in different countries and would not ensure uniformity. 8/

11. The terminology used in Article 1(1) differs from that of the 1993 MLM Convention. 9/ Consequently, there may be claims which are granted maritime lien status but remain outside the Arrest Convention. The terminology used in the Arrest Convention in respect of claims with maritime lien status should, in so far as possible, be closely aligned with, or identical to, that of the 1993 MLM Convention.

12. Article 1(1)(a) covers "damage caused by the ship, whether in collision or otherwise". This provision may be compared with that of Article 4, paragraph 1(e) of the 1993 MLM Convention. It may be necessary to consider whether the words "or otherwise" are sufficiently clear and include all types of claims covered by Article 4, paragraph 1(e) of the 1993 MLM Convention.

8/ See CMI, Lisboa II, 1985, pp 126-128.

9/ See Article 4(1) of the 1993 MLM Convention, A/CONF.162/7.

It should also be noted that the provision of Article 1(1)(a) of the Arrest Convention is not limited to tort claims but also includes contractual claims. Article 1(1)(a) of the Arrest Convention has been reproduced in the CMI Draft.

13. Article 1(1)(b) of the Arrest Convention and Article 4(1)(b) of the 1993 MLM Convention deal with claims in respect of loss of life and personal injury. The provision of the latter Convention, however, also includes the words "whether on land or on water". It would be advisable to use the same wording in the Arrest Convention, especially bearing in mind that Article 4(1)(b) is not limited to tort claims. The term "whether on land or on water" is not included in the CMI Draft. 10/

14. Article 1(1)(c) includes claims in respect of "salvage". Article 4(1)(c) of the 1993 MLM Convention grants maritime lien status to "claims for reward for the salvage of the vessel". This was to exclude the special compensation provided for in Article 14 of the 1989 Salvage Convention. It may be desirable to make a similar amendment in the Arrest Convention. 11/ In the CMI Draft the term "salvage operations or any salvage agreement" is used. 12/

15. Article 1(1)(m) permits arrest only in respect of claims for "wages of masters, officers or crew". Article 4(1)(a) of the 1993 MLM Convention, however, recognizes maritime liens in respect of "claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf". The latter provision is much more clear in that it (i) makes specific reference to sums other than wages due to the master, etc; (ii) replaces the word "crew" with the term "other members of the vessel's complement" so as to include claims of those who, although working on board ship, may not be qualified as members of the crew; (iii) includes costs of repatriation and social insurance contributions payable on their behalf. This removes all controversy as to whether or not social insurance contributions and costs of repatriation would be covered by the term "wages".

10/ Article 1(1)(b).

11/ See also Article 7(1)(e).

12/ Article 1(1)(c).

16. The CMI Draft uses similar wording to that of the 1993 MLM Convention except that no reference is made to the costs of repatriation. Such omission may not be significant, since the list of maritime claims in the CMI Draft is open-ended. 13/

17. Consideration may be given to amending the wording of Article 1(1)(m) of the Arrest Convention to bring it into line with that of the 1993 MLM Convention.

18. Article 1(1)(q) of the Arrest Convention includes claims arising out of "the mortgage or hypothecation of any ship" within the list of maritime claims. 14/ The wording used in the 1993 MLM Convention is "mortgages, 'hypothèque' and registrable charges of the same nature". The wording used in the CMI Draft is identical to that of the 1993 MLM Convention. 15/

19. It is advisable to use the same wording in the Arrest Convention so as to allow the holders of registrable charges of the same nature as the mortgage or hypothèque to arrest the ship in respect of claims arising from such charges. Furthermore, the word "hypothecation" should be replaced with the term "hypothèque", as the former has a different meaning under English law and is used in relation to bottomry bond and respondentia. 16/

20. In view of the above the JIGE may wish to consider what amendments would be required to Article 1 of the Arrest Convention, taking account of the adoption of the 1993 MLM Convention.

B. Article 2 - Powers of arrest

21. Article 2 permits arrest only for maritime claims. It sets out the principal rule of the Convention that ships flying the flag of a Contracting State may be arrested in the jurisdiction of another Contracting State only in respect of a maritime claim but in respect of no other claim. This provision

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13/ Article 1(1)(o).

14/ See also Article 7(1)(f).

15/ Article 1(1)(u).

16/ See document JIGE(VI)/3, TD/B/C.4/AC.8/22, LEG/MLM/22, p 7; see also Berlingieri on Arrest of Ships, op cit, pp 72-73.

stresses the need for inclusion of all maritime liens within the list of maritime claims, since the arrest is, together with the seizure, the only means of preventing the extinction of maritime liens.

22. In this context consideration should be given to Article 6 of the 1993 MLM Convention, which permits States Parties to grant in their national law other maritime liens to secure claims other than those set out in Article 4 of the Convention. It should be considered whether rights of the holders of such national liens need protection by allowing them the right of arrest for their claims. If so, it should further be considered whether adopting some general wording together with an extended list of maritime claims would provide an appropriate solution. The CMI Draft solves the problem by providing for an open-ended list of maritime claims in Article 1.

C. Article 3 - Vessels that may be arrested

23. Paragraphs 1 and 4 of Article 3, which contain provisions regarding vessels that may be arrested in respect of a maritime claim, 17/ have been the subject of detailed discussion in the secretariats' previous document JIGE(VI)/3. 18/ The document considered aspects of paragraphs 1 and 4 of

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17/ Paragraph 1 of Article 3 provides:

"Subject to the provisions of paragraph (4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which maritime claim arose, or any other ship which is owned by the person who was, at the time when maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q)."

Paragraph (4) reads:

"When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such claims.

"The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship".

18/ See pp 9-15.

Article 3 which gave rise to varying interpretation and controversy, including the fact that it was not entirely clear from the wording of these paragraphs whether or not personal liability of the owner was essential for the purpose of arrest under the Convention. The document also considered the approach adopted by the CMI Draft in attempting to resolve some of he ambiguities which were considered to exist in relation to the subject.

24. Document JIGE(VI)/3 proposed the following questions for consideration by the Joint Group:

(a) Whether it was deemed appropriate to limit the right of arrest in respect of claims not secured by maritime liens to a ship owned by the person liable;

(b) If so, whether Article 3 of the 1952 Convention was considered sufficiently clear, or likely to be construed so as to allow the arrest of a ship not owned by the person liable even in respect of claims which are not secured by maritime liens;

(c) Whether, on the assumption that the right of arrest of a ship not owned by the person liable is limited to claims secured by maritime liens, such liens should only be those recognized by the Maritime Liens and Mortgages Convention, or also include the national maritime liens under the applicable law;

(d) If Article 3 of the 1952 Convention is not considered satisfactory, whether the solution adopted by the CMI Draft is considered as satisfactory. 19/

25. The above questions are still valid in relation to the 1993 MLM Convention. A question which may require specific consideration in the adoption of the 1993 MLM Convention is whether it would be advisable to align the text of Article 3, paragraph 4 with that of the opening sentence of Article 4, paragraph 1 of the 1993 MLM Convention.

26. Article 4(1) of the 1993 MLM Convention provides that claims set out therein against the owner, demise charterer, manager or operator of the vessel are secured by a maritime lien on the vessel. Thus, unlike the

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19/ See ibid, pp 14-15.

1967 Convention, 20/ claims against the time charterer or voyage charterer are not secured by a maritime lien under the 1993 MLM Convention. Such claims, however, would give rise to a right of arrest under Article 3, paragraph (4) of the Arrest Convention. The provisions of Article 3, paragraph (4), which allow arrest of a vessel as security for claims against the demise charterer, further provide that the aforesaid provisions also apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

27. Attempts have been made to place a more restrictive interpretation on Article 3(4) so as to avoid a situation whereby a vessel can be arrested in a Contracting State but the underlying claim can not be enforced against that vessel. It is therefore submitted that arrest can only be lawfully made if under the applicable law the claim may be enforced against that vessel. 21/

28. The CMI Draft overcomes the problem by expressly granting the right of arrest in respect of all claims secured by a maritime lien. 22/

D. Article 3(3) - Right of rearrest

29. Paragraph 3 of Article 3 has been discussed in document JIGE(VI)/3. 23/ The JIGE has been invited to consider whether the approach adopted by the Arrest Convention, whereby a second arrest of a vessel in respect of the same maritime claim by the same claimant is not permitted, is satisfactory, or whether it would be desirable to provide for the possibilities of rearrest and multiple arrest under certain conditions. It does not call for any further comment.

20/ Article 7.

21/ See A Philip, "Maritime Jurisdiction in the EEC", Acta Scandinavia Juris Gentium, 1977, pp 113-118; document JIGE(VI)/3, p 12; Berlingieri on Arrest of Ships, op cit, p 99; see also the CMI Draft, Article 3(3).

22/ See Article 3(1).

23/ See pp 15-17.

E. Article 6 - Wrongful arrest

30. Article 6 and questions relating to the provision of security and liability for loss or damage caused by wrongful arrest were considered in the secretariats' previous report. 24/ The JIGE was invited to consider whether it was desirable to include within the Convention (i) provisions requiring the Court to make the arrest conditional upon the provisions of security by the claimant, possibly with some exceptions, for example, in cases of arrest by seamen in preserving a maritime lien for wages; (ii) express provisions on liability for loss or damage caused by wrongful and unjustified arrest. 25/

31. If the JIGE deems it appropriate to include provisions in the Convention concerning the provision of security in respect of certain claims, then it may also wish to give further consideration to providing some guidelines as to the manner in which such security may be granted: for example, the nature of the security, the manner of calculation and issues which should be taken into account such as the amount of the claim, loss of time or earnings to the shipowner, etc. Such provisions would be valuable in encouraging uniformity in implementation.

F. Article 7 - Jurisdiction on the merits of the case

32. Document JIGE/VI)/3 considered Article 7 of the Arrest Convention and the fact that it grants jurisdiction on the merits of the case to the Courts of the country within which arrest is made in a limited number of cases (which may be considered arbitrary) where such jurisdiction does not exist under the lex fori. 26/ It also considered the approach adopted by the CMI whereby jurisdiction is granted to the Courts of the forum arresti to determine the case upon its merits unless the parties agree otherwise or where the Court refuses to exercise its jurisdiction and that refusal is permitted by the lex fori and a Court of another country accepts jurisdiction. 27/

24/ JIGE(VI)/3, pp 17-18.

25/ JIGE/VI)/3, p 18.

26/ See pp 18-20.

27/ Article 7 of the CMI Draft.

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33. The JIGE may wish to consider whether the 1952 Convention's approach of providing for a list of a limited number of cases is satisfactory; or whether it would be more appropriate to grant general jurisdiction to the Courts of the country where the ship is arrested to determine the case upon its merits. 28/

G. Article 8(2) - Application to ships of non-Contracting States

34. According to paragraph 2 of Article 8, "a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest."

35. Thus, under paragraph 2 of Article 8, ships flying the flag of non-Contracting States may be arrested not only in respect of maritime claims listed in Article 1, but also for any claim provided such arrest is permitted under lex fori. It is not, however, clear from the terminology used whether all the provisions of the Convention, except Article 2 (i.e., limiting right of arrest only to maritime claims), are to apply to ships of non-Contracting States, or whether it is only the right of arrest in respect of maritime claims and not the whole Convention, which is to apply to such ships. While the wording of Article 8(2) seems to support the latter view, it is submitted that the former is supported by the Travaux Préparatoires. 29/

36. The approach adopted by the CMI Draft is to provide for application of the whole Convention to "any sea-going ship, whether or not that ship is flying the flag of a State Party." 30/ However, it also provides that States may reserve the right not to apply the Convention to ships of non-Contracting States. 31/

28/ For further information on the subject, see Berlingieri on Arrest of Ships, op cit, pp 166-170.

29/ See Berlingieri on Arrest of Ships, op cit, pp 22-23.

30/ Article 8(1).

31/ Article 9.

37. The Joint Group may wish to consider whether the present text of Article 8 is satisfactory, or whether it would be appropriate, in line with more modern maritime Conventions and the 1993 MLM Convention, 32/ to provide for general application of the whole Convention whether or not the ship is flying the flag of a State Party.

H. Article 9 - No further maritime lien

38. The second part of Article 9 expressly provided that the Convention does not create "any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable." At the time of the adoption of the Arrest Convention in 1952, reference to "the Convention on Maritime Mortgages and Liens" could only be to the 1926 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages. With the existence of three Conventions on maritime liens and mortgages, this provision would therefore need to be amended. The CMI Draft solves the problem by simply providing that nothing in the Convention shall be construed as creating a maritime lien. 33/

39. Furthermore, consideration may also need to be given to aligning the terminology in the English and French texts of Article 9 where in the English text the term "any maritime liens" is used and in the French version the words "aucun droit de suite".

32/ Article 13.

33/ Article 8(3).

III. CONCLUDING REMARKS

40. This note provides a brief update to the UNCTAD and IMO secretariats' previous report entitled "Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952", 34/ which will also be before the Joint Intergovernmental Group. The note focuses, inter alia, on the amendments to the 1952 Arrest Convention which might be required as a result of the adoption of the International Convention on Maritime Liens and Mortgages, 1993.

41. The Joint Intergovernmental Group may wish to take a decision on the scope of the revision of the 1952 Arrest Convention. It may wish to consider whether a thorough revision of the Convention is desirable in order to clarify any ambiguity which may be considered to exist, giving rise to varying interpretation. It may, on the other hand, decide to limit the scope of the revision to mere drafting amendments consequential upon the adoption of the 1993 MLM Convention. The latter course of action, however, would still require substantive decisions in relation to national maritime liens granted under Article 6 of the 1993 MLM Convention. The 1926 and 1967 Conventions do not contain any reference to other maritime liens which may be granted by States Parties under national law. Thus, the impact of such liens in relation to the Arrest Convention has never been considered before. The Joint Group may therefore wish to consider whether paragraph (1) of Article 1 may be amended in order to permit arrest in relation to national maritime liens, and thus to provide a certain protection to holders of such liens, bearing in mind the short extinction period provided in the Convention.

34/ Document JIGE/VI)/3.

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Consideration of the review of the 1952 Convention on Arrest of Sea-Going Ships

Note by the UNCTAD secretariat

Corrigendum

On page 6, paragraph 8, line 8, after "and that" insert "such maritime liens are not included in the list of maritime claims. In such a case the vessel may not be arrested. Thus, the right to grant national".

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REPORT OF THE JOINT UNCTAD/IMO INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS ON ITS SEVENTH SESSION

held at the Palais des Nations, Geneva
from 5 to 9 December 1994

The attached report (JIGE(VII)/3)* has been prepared on the seventh session of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects.

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Seventh session

Geneva, 5 to 9 December 1994

REPORT OF THE JOINT INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS ON ITS SEVENTH SESSION

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Annexes

I. Report on the work of the Sessional Group

II. Draft articles for a Convention on Arrest of Ships

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IV. Attendance

INTRODUCTION

1. The Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, established by the International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD), held its seventh session at the Palais des Nations, Geneva, from 5 to 9 December 1994.

2. During the session, two plenary meetings and five informal meetings of the sessional group of the whole were held.

Opening statement

3. The **Officer-in-charge of the Services Development Division of UNCTAD**, speaking on behalf of the Secretary-General of IMO and the Officer-in-charge of UNCTAD, congratulated the Joint Group for the excellent work carried out during the six sessions held between 1986 and 1989 in preparing the Draft Convention on Maritime Liens and Mortgages. The adoption of the International Convention on Maritime Liens and Mortgages, 1993, by the UN/IMO Conference of Plenipotentiaries was an outstanding achievement in the unification of law and marked an excellent example of fruitful cooperation between UNCTAD and IMO.

4. The task of the Group was both very important and complex, as the subject of arrest of ships was of crucial importance to the shipping community. Arrest being a means of enforcing maritime liens and mortgages, it was essential that the international Conventions governing these issues be closely aligned so as to ensure that all claims secured by maritime liens were given right of arrest under the Convention. The Group would therefore need to consider the scope of amendments necessary to the 1952 Convention on Arrest of Ships.

Chapter I

CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

(Agenda item 3)

5. For its consideration of this item, the Joint Intergovernmental Group of Experts had before it the following documentation:

"Consideration of the review of the 1952 Convention on Arrest of Sea-going Ships" - report by the UNCTAD secretariat (JIGE(VII)/2-TD/B/CN.4/GE.2/2-LEG/MLM/29);

"Consideration of the scope of the revision of the International Convention relating to the Arrest of Sea-going Ships" - note by the secretariat of UNCTAD (JIGE/(VI)/3-TD/B/C.4/AC.8/22-LEG/MLM/22).

General statements

6. The representative of **Brazil** said that uniformity of the rules applying to maritime mortgages was necessary to facilitate international maritime finance. The opportunity should not be lost to revise the 1952 Arrest Convention, which should be an international instrument guaranteeing the execution of maritime claims, including mortgages, and which should also serve as a guideline for the revision of national legislation concerning arrest of ships. Except for one, the countries of Latin America had not ratified the 1952 Arrest Convention, mainly because the majority found it unsatisfactory and in conflict with their current national laws and practices. For the sake of uniformity, all Latin American countries should join in an effort to review and enact a new law on arrest of ships. The purpose of uniformity could be better achieved if regional governmental or non-governmental organizations dealing with maritime law, with the support of UNCTAD and IMO, proposed a model law for consideration by Latin American countries. This task was in fact part of the mandate given by the governing bodies of UNCTAD and IMO to the Group of Experts. Finally, his delegation supported the revision of the 1952 Arrest Convention, taking into account the CMI Lisbon Draft and the International Convention on Maritime Liens and Mortgages, 1993.

7. The representative of the **United States of America** said that, if it merely limited its discussion to "editorial" changes to the 1952 Convention on Arrest of Ships, the Group would not discuss those areas where conflicting interpretations existed or where time had shown a need for improvement. His delegation was in favour of addressing the problems identified by the CMI and the secretariats of UNCTAD and IMO and not merely bringing the 1952 International Convention on Arrest of Ships into line with the International Convention on Maritime Liens and Mortgages, 1993.

8. The observer for the **International Chamber of Commerce** said that his organization favoured an examination, and the inclusion in a new convention, of the enforcement procedures to be followed between arrest and forced sale. The inclusion of liens and mortgages - particularly mortgages - as a basis for

arrest failed to take full account of those enforcement mechanisms commonly available under the national laws of most maritime nations. With regard to methods of enforcement, particularly during the interval between arrest and forced sale, the procedures to be followed should be flexible. The proposed new convention on arrest of ships should permit a vessel to be sold prior to entry of a judgement, in order to spare creditors from unreasonable custodial costs, as was already the case in some countries, and States that became parties to the new convention should, in order to deal with methods of enforcement, overhaul their procedures to take account of the need to permit a sale, pursuant to court order, prior to entry of a formal judgement or forced sale under Articles 11 and 12 of the International Convention on Maritime Liens and Mortgages, 1993.

Consideration of agenda item 3 in the Sessional Group of the Whole

9. At its opening plenary, the Joint Intergovernmental Group decided to establish an informal Sessional Group of the Whole to consider agenda item 3.

10. After preliminary consideration of the topic based on documents JIGE(VII)/2 and JIGE(VI)/3, the Sessional Group instructed the secretariats to prepare a new set of draft articles on the basis of the CMI draft, together with amendments made necessary as a result of the adoption of the 1993 MLM Convention and observations made by delegations during the session, and it exchanged views on that new set of draft articles (TD/B/CN.4/GE.2/CRP.1).

11. At its last meeting, on 9 December 1994, the Sessional Group of the Whole adopted its draft report to the plenary (TD/B/CN.4/GE.2/L.2 and Add.1).

Action by the Joint Intergovernmental Group of Experts

12. At its closing plenary, on 9 December 1994, the Joint Intergovernmental Group of Experts approved the report of the Sessional Group of the Whole and decided to annex the Sessional Group's report to its own report (see annex I below). It also decided to annex the "Draft articles for a Convention on Arrest of Ships" to its report (see annex II below).

Chapter II

ORGANIZATIONAL MATTERS

A. Opening of the session

13. The seventh session of the Joint Intergovernmental Group of Experts was opened on 5 December 1994 by Mr. G.G. Ivanov (Russian Federation), Chairman of the Group at its sixth session.

B. Election of officers

(Agenda item 1)

14. At its opening plenary meeting, on 5 December 1994, the Joint Intergovernmental Group of Experts agreed that the officers for its seventh session would be the same as for its previous sessions, except that Mr. S. Ruiz Olmedo (Mexico) would be replaced by Mr. I. Melo Ruiz (Mexico). The officers for the seventh session were thus as follows:

Chairman:	Mr. G.G. Ivanov	(Russian Federation)
Vice-Chairmen:	Mr. I. Melo Ruiz	(Mexico)
	Mr. K.-J. Gombrii	(Norway)
Vice-Chairman cum-Rapporteur:	Mr. Zengjie Zhu	(China)

C. Adoption of the agenda and organization of work

(Agenda item 2)

15. At its opening plenary meeting, on 5 December 1994, the Joint Intergovernmental Group of Experts adopted its provisional agenda, as contained in document JIGE(VII)/1-TD/B/CN.4/GE.2/1-LEG/MLM/28. The agenda for its seventh session was thus as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

4. Provisional agenda and date of the eighth session of the Joint Intergovernmental Group of Experts

5. Other business

6. Adoption of the report of the Joint Intergovernmental Group on its seventh session.

16. Also at its opening plenary, the Joint Intergovernmental Group decided to establish an informal sessional group of the whole to consider agenda item 3.

D. Provisional agenda and date of the eighth session of the Joint Intergovernmental Group of Experts

(Agenda item 4)

17. At its closing plenary, on 9 December 1994, the Joint Intergovernmental Group of Experts adopted the provisional agenda for its eighth session (see annex III).

18. The Group was informed that its eighth session, which would take place in London, would be held in October 1995. However, the exact dates were subject to confirmation.

E. Adoption of the report of the Joint Intergovernmental Group on its seventh session

(Agenda item 6)

19. At its closing plenary, on 9 December 1994, the Joint Intergovernmental Group of Experts adopted its draft report (TD/B/CN.4/GE.2/L.1) and authorized the Rapporteur to complete the final text in order to reflect the proceedings of the closing plenary.

Annex I

REPORT ON THE WORK OF THE SESSIONAL GROUP OF THE JOINT UNCTAD/IMO INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS AT ITS SEVENTH SESSION

Item 3 - Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

Introduction

1. The Sessional Group noted that it had been requested by the plenary of the Joint Intergovernmental Group of Experts to deal with agenda item 3, namely consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952.

A. Preliminary consideration

2. The Sessional Group considered document JIGE(VII)/2, issued by UNCTAD under cover of TD/B/CN.4/GE.2/2 and by IMO under cover of LEG/MLM 29, prepared by the secretariats of UNCTAD and IMO, which outlined possible modifications to the 1952 Arrest Convention that might be required in the light of the adoption of the 1993 MLM Convention. The Group also had before it document JIGE(VI)/3 (TD/B/C.4/AC.8/22-LEG/MLM/22), which included the draft revision of the 1952 Convention prepared by the CMI at its 1985 Lisbon conference (hereinafter "the CMI Draft"). The Group started a preliminary reading of the articles of the Convention, bearing in mind the comments and observations contained in document JIGE(VII)/2 prepared by the secretariats of UNCTAD and IMO.

Article 1: Claims in respect of which a vessel may be arrested

3. Some delegations considered that the list of maritime claims set out in article 1 of the 1952 Convention was incomplete and out of date. They preferred the approach adopted by the CMI Draft, providing for an open-ended list of maritime claims. In the opinion of these delegations, the inclusion of general wording in the "chapeau" enabling an open-ended list of claims reflected a compromise solution for different legal systems. This was considered appropriate, bearing in mind that article 6 of the 1993 MLM Convention allowed States Parties to grant under their law national maritime liens other than those mentioned in article 4, paragraph 1. Unless the list of claims in article 1 of the Arrest Convention became open-ended, there was a risk that a maritime lien granted in accordance with article 6 of the MLM Convention would not be secured by arrest if it was not included in the list in article 1 of the Arrest Convention.

4. Some delegations opposed this. In their view, the list should remain a closed one, in order to ensure that arrest remained an exceptional measure to be used only as a last resort to secure maritime claims. An open list could lead to abusive exercise of the right of arrest in respect of claims of only relative importance. Claims given national maritime lien status under article 6 of the MLM Convention should not necessarily be included in the list, bearing in mind that the matter should be regulated by national law.

5. The Group had a preliminary discussion on several aspects of the list of claims contained in article 1 of the 1952 Arrest Convention and of the CMI Draft in order to introduce amendments needed as a result of the adoption of the 1993 MLM Convention.

6. It was agreed that terminology used in the Arrest Convention in respect of claims with maritime lien status should be closely aligned with that of the 1993 MLM Convention. Bearing in mind article 4, paragraph 1 (a) of the MLM Convention, the Group agreed that costs of repatriation should be included in the list of maritime claims in article 1.

7. Some delegations considered that the concept of "bottomry" was out of date and should be excluded from the list of maritime claims. One delegation reserved its position regarding such exclusion.

8. Some delegations expressed views in favour of including in the list claims related to the special compensation provided for in article 14 of the 1989 Salvage Convention. Those delegations accordingly considered that the present text in the CMI Draft (art. 1 (1) (c)) should be maintained.

9. Other delegations stated they were in favour of excluding such special compensation. In their opinion, the right to arrest should be granted only in respect of liens securing claims for reward for salvage of the vessel.

10. The observer for the Institute of International Container Lessors supported article 1 (1) of the CMI Draft, provided it was not taken to mean that containers had to be supplied to a particular ship.

11. In view of the above, the Sessional Group agreed to take the CMI Draft as a basis for discussion and make the amendments required as a result of the adoption of the 1993 MLM Convention. 1/

Article 2: Powers of arrest

12. In the context of article 2 (5) of the CMI Draft, one delegation favoured the complete standardization of procedures relating to arrest. This delegation proposed inclusion in the Arrest Convention of a provision for the interlocutory sale of an arrested vessel in appropriate circumstances, such as failure of the owner to post security within a reasonable period of time, or where the costs of maintaining the vessel under arrest were excessive, etc. This proposal was opposed by some delegations which felt that the issue was outside the scope of the Arrest Convention, since the term "arrest", being confined to "conservatory" measures, did not include measures for satisfaction of judgement. The matter, therefore, was governed by the applicable law, and could not be covered under the Arrest Convention.

1/ See "Draft articles for a Convention on Arrest of Ships" (contained in annex II to the present report), art. 1. For the discussions on the "Draft articles", see paras. 33-55 below.

13. The representative of the International Chamber of Commerce stated that review of the Arrest Convention should go beyond the CMI Draft and take account of the changes brought about by the 1993 Convention on Maritime Liens and Mortgages. He suggested that consideration should be given to interim methods of enforcement and inclusion of provisions in the Arrest Convention to deal with interlocutory methods of enforcement.

14. Most delegations, however, agreed to take the CMI Draft as a basis for discussion, taking into account changes required by the 1993 Convention on Maritime Liens and Mortgages. 2/

Article 3: Vessels that may be arrested

15. Most delegations preferred the approach adopted by the CMI Draft regarding the requirement of personal liability of the owner for the purpose of arrest under the Convention. The text of the 1952 Arrest Convention was considered inadequate, as it did not clearly link arrest with personal liability of the owner. Some delegations, on the other hand, considered that the approach adopted by the 1952 Arrest Convention was satisfactory.

16. Some delegations, however, considered that national maritime liens granted under article 6 of the 1993 MLM Convention should be given right of arrest under the Arrest Convention, irrespective of personal liability of the owner. In their view, the compromise reached in article 6 of the 1993 Maritime Liens and Mortgages Convention required Contracting States to recognize the national maritime liens of other Contracting States. Personal liability of the owner should only be required when the claim was not secured by a maritime lien. With regard to claims secured by a "maritime lien", a number of delegations felt that the right of arrest under the Convention should only be given to those claims covered under article 4 of the 1993 MLM Convention and not under article 6. In their view, it was not the intention of article 6 to impose an obligation on other States Parties to recognize and enforce national maritime liens granted in a State Party. It was, however, recognized that some reference could be made to such national liens in the Arrest Convention. One delegation referred to paragraph 27 of document JIGE(VII)/2 (TD/B/CN.4/GE.2/2-LEG/MLM/29) concerning avoidance of a situation when a vessel can be arrested in a State Party but the underlying claim cannot be enforced against that vessel. 3/

17. One delegation proposed amending the first sentence of article 3 (2) of the CMI Draft to read "(2) Arrest is also permissible of any other ship or ships ...".

18. The representative of the Institute of International Container Lessors (IICL) stated that article 3 (1) (d) of the CMI Draft appeared to deal with cases where claims were not secured by "maritime liens" but did not include the case of time charterers. He considered that specific provisions were required to secure suppliers with the right of arrest in such circumstances.

2/ See "Draft articles", art. 2.

3/ See "Draft articles", art. 3; see also paras. 41-43 below.

Article 3 (3): Right of rearrest and multiple arrest

19. Some delegations preferred the approach adopted by the 1952 Convention whereby a second arrest of a vessel was not permitted. They could not, therefore, support article 5 of the CMI Draft in permitting rearrest and multiple arrest in certain cases. In the view of these delegations, the right of rearrest and multiple arrest should be restricted to exceptional circumstances, such as fraud or misrepresentation, in order to protect the legitimate interests of shipowners as well as the cargo interests. Paragraph 1 (c) of the CMI Draft was criticized in this regard.

20. Other delegations favoured a more flexible approach to cases other than fraud or misrepresentation which would justify a rearrest in respect of the same maritime claim. In this regard mention was made of cases such as collisions where a proper assessment of the claim could only be effected at a later stage, or if the amount of the claim exceeded the value of the arrested vessel, which should give right to the arrest of a sister ship.

21. The Group agreed that this article should be put in brackets for consideration at a later stage, together with alternative proposals which might be submitted by delegations. 4/

Article 6: Wrongful arrest

22. One delegation believed that the Convention should not, even as a matter of discretion, permit courts to make arrest conditional upon the provision of security by the claimant. In the opinion of some other delegations, the Convention should include guidelines as to whether Courts could make the arrest conditional upon the provisions of security by the claimant, as well as provisions on liability for loss or damage in case of wrongful arrest.

23. Some delegations opposed this view on the grounds that it would limit the discretion of the Courts to rule on cases of wrongful arrest in accordance with the law of the forum arresti. The article contained in the CMI draft was accordingly considered a suitable one. Some delegations, however, considered this provision unsatisfactory and preferred to retain the original provision contained in the 1952 Convention.

24. Some delegations referred to the need to include appropriate text to ensure that seamen would be exempted from the obligation to provide guarantees against wrongful arrest in respect of claims secured by maritime liens mentioned in article 4 (1) (a) of the 1993 MLM Convention.

25. The majority of delegations, however, agreed that the text of the CMI Draft should be used as a basis for future work. 5/

4/ See "Draft articles", art. 5; see also paras. 46-51 below.

5/ See "Draft articles", art. 6; see also para. 52 below.

Article 7: Jurisdiction on the merits of the case

26. In reply to a question by one delegation, the observer for the Comité Maritime International (CMI) explained that article 7 (1) of the 1952 Convention was a compromise between the view held by common law countries, which considered arrest a means of obtaining jurisdiction, and the opposing view held by civil law countries which required the application of general principles in this respect. The approach adopted by article 7 (1) in giving jurisdiction on merits only in certain cases not being considered satisfactory, the CMI Draft granted general jurisdiction to the courts of the country where the ship was arrested in respect of all claims.

27. One delegation preferred the approach adopted by the 1952 Convention. In its view, the provisions of the 1952 Convention were more consistent with general principles of international maritime law and maritime Conventions such as the Convention on Limitation of Liability. It was further pointed out that granting general jurisdiction to the courts of the country where the ship was arrested would not be equitable.

28. Many delegations expressed support for retaining article 7 of the CMI Draft, whereby jurisdiction was granted to the courts of the forum arresti to determine the case upon its merits unless the parties agreed otherwise, or where the court refused to exercise its jurisdiction and that refusal was permitted by the lex fori and a court of another country accepted jurisdiction. 6/

Article 8: Application

29. It was noted that article 8 (2) of the 1952 Convention had given rise to problems of interpretation in various jurisdictions. The wording of article 8 (2) did not make it clear whether the whole of the provisions of the Convention were to apply to ships of non-contracting States, or only article 1 providing for right of arrest in respect of maritime claims. Most delegations preferred the approach adopted by the CMI Draft providing for application of the whole Convention to ships of non-contracting States.

30. The Group also agreed that the sovereign immunity provision in article 8 of the CMI Draft did not go far enough, in that it did not exclude State-operated ships from the scope of the Convention. Accordingly, the Group agreed that the text of paragraph 2 of article 8 of the CMI Draft should be amended to correspond with article 13, paragraph 2 of the 1993 MLM Convention. 7/

Article 9: No further maritime lien

31. The Joint Group further considered that article 8 (3) of the CMI Draft, providing that nothing in the Convention shall be construed as creating a maritime lien, was in principle acceptable. The second part of article 9 of

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6/ See "Draft articles", art. 7.

7/ See "Draft articles", art. 8 (2).

the 1952 Convention, which referred to the Convention on Maritime Liens and Mortgages, was considered inappropriate, given the existence of three Conventions on the subject. 8/

32. The observer for the CMI explained that reference to creating a right of action had been omitted from the CMI Draft, as it was considered to be outside the scope of the Arrest Convention and could lead to different interpretations in various jurisdictions.

B. Further consideration based on "Draft articles for a Convention on Arrest of Ships"

33. The Sessional Group, having completed preliminary consideration of the subject, instructed the secretariats to prepare a new set of articles on the basis of the CMI Draft, together with amendments made necessary as a result of the adoption of the 1993 MLM Convention and observations made by delegations during the session. The text prepared by the secretariats, entitled "Draft articles for a Convention on Arrest of Ships" (TD/B/CN.4/GE.2/CRP.1), was put before the Sessional Group for consideration. 9/ The Group held a brief exchange of views and the following is an account of the discussion.

Article 1: Definitions

34. The Group noted that the text of subparagraphs (a), (b), (n) and (o) of article 1 (1) had been changed to reflect the terminology used in the 1993 MLM Convention.

35. One delegation suggested that in subparagraph (u), the term "registrable charges" of the same nature as a mortgage or "hypothèque" should be used so as to conform to the wording used in the MLM Convention. This delegation also proposed avoiding the use of "she" in reference to a vessel in the text of the Convention.

36. The observer for the CMI noted that, as the 1993 MLM Convention used the term "demise charterer", consideration should be given to the use of the same term in place of "bareboat charterer" in subparagraphs (q) and (r) of article 1 (1), and indeed elsewhere in the draft Convention.

37. One delegation suggested placing the term "such as any claim" in the chapeau of article 1 in brackets to avoid creating an open-ended list of maritime claims. Another delegation proposed deleting the word "direct" in subparagraph (b) so as to avoid creating a limitation which did not exist in the chapeau of article 1 (1). This delegation also raised the question as to whether in subparagraphs (k) and (n) references to pilotage and pilotage dues were repetitive.

8/ See "Draft articles", art. 8 (3); see also para. 54 below.

9/ The text of the "Draft articles" is reproduced in annex II below.

38. The Sessional Group heard the report of the Chairman of the Informal Group which it had set up to consider the definition of salvage and special compensation. The Chairman of the Informal Group said that the present wording of article 1 defined any claim in respect of salvage operations or any salvage agreement as a maritime claim. Since the reasons for excluding special compensation from the MLM Convention were not relevant to the Arrest Convention, the Group, after thorough consideration of the matter, had come to the conclusion that the present wording of article 1 should be retained.

39. The Sessional Group agreed to maintain the words "salvage operations or any salvage agreement", and to delete reference to "reward for the salvage of the vessel". Some opposing views were expressed.

Article 2: Powers of arrest

40. No comments.

Article 3: Exercise of right of arrest

41. The Sessional Group noted that in article 3 (1) (a), the list of maritime liens contained in (i) to (v) had been changed to reflect the terminology used in article 4 (1) of the MLM Convention.

42. The Sessional Group heard the report of the Chairman of the Informal Group which it had set up to examine the question of aligning the provisions of article 6 of the MLM Convention dealing with national maritime liens with those of the Arrest Convention. It appeared that there were differing views as to the intention of article 6. While the majority of delegations believed that article 6 did not impose an obligation on other States Parties to recognize and enforce national maritime liens, some delegations held the opposite view. No unified solution could therefore be found. The following proposals thus emerged: (a) to retain the text of article 3 (1) as contained in CRP.1 as it was; (b) to delete the text after "maritime lien" in article 3 (1) (a), including (i) to (v), 10/ which might have the effect of making national maritime liens enforceable in all States; (c) to insert in article 3 (1) a new subparagraph (b) which would read: "the claim is secured by a maritime lien granted by the law of the State where the arrest is requested pursuant to the provisions of article 6 of the International Convention on Maritime Liens and Mortgages, 1993;". The latter proposal had been put forward by the Chairman of the Informal Group in an attempt to provide a compromise so as to clarify that a vessel might be arrested for claims secured by national maritime lien even if it were sold, but with effect only in the enacting State and without any obligation on other States. In concluding, the Chairman of the Informal Group expressed the view that the question of aligning the Arrest Convention with article 6 of the MLM Convention in a satisfactory manner was crucial for the future of both the MLM Convention and the Arrest Convention.

10/ Proposal by the delegation of the United States of America.

43. The Sessional Group agreed to place the three proposals in brackets for further discussion. It was also agreed to remove the brackets around the words "also" and "other" in paragraph (2) of article 3.

Article 4: Release from arrest

44. One delegation suggested that the phrase "not exceeding the value of the ship" be deleted from paragraph 2, bearing in mind that the total amount of the claim to be secured by the arrest could exceed this value.

45. This proposal was opposed by the majority of delegations. In this regard, it was explained that the action of arrest, being by nature "in rem", was necessarily restricted to the provision of a security which could not exceed the value of the ship.

Article 5: Right of rearrest and multiple arrest

46. The delegations of the United States of America, Liberia and the Republic of Korea introduced a proposal to amend article 5, as contained in TD/B/CN.4/GE.2/CRP.2. In their opinion the proposal would ensure that rearrest remained in principle an exceptional measure.

47. The proposal was considered by the majority of delegations as too restrictive and therefore could not be supported. In this regard reference was made to cases previously mentioned during the session which justified not only rearrest of the same vessel but also of a sister ship. To limit the possibility of a new arrest to fraud or material misrepresentation could have a negative impact on the shipowner, because the arrestor would have to request the highest possible security to protect his interest. These delegations were of the opinion that the text of the present article offered a fair compromise and equitable solutions to any conflict.

48. The observer for the CMI explained that paragraph 1 (c) envisaged cases where, on reasonable or justifiable grounds, release of a ship was decided without requesting any guarantee to secure claims. This could be the case of any agreement between the arrestor and the shipowner in which the first one would agree to release a vessel in order to prevent losses which would result out of non-compliance of terms of a charter party. Release could also take place at the request of a port authority on grounds of safety considerations or any other circumstance which could lead to the need to vacate the area in which the ship was arrested.

49. Several delegations nevertheless maintained their reservations regarding the wording and purpose of this paragraph.

50. The observer delegation of the International Association of Ports and Harbours (IAPH) referred to the need to ensure that the full value of claims regarding damages to port installations was also protected by the possibility of rearrest. Very frequently port authorities could only assess the real magnitude of these damages after a ship had been released. The possibility of rearrest would facilitate the release of ships amicably and promptly.

51. The Sessional Group agreed to retain the present text of the article, placing subparagraph 1 (c) in brackets, and also to include as an alternative the proposal put forward by the delegations of the United States of America, the Republic of Korea and Liberia.

Article 6: Protection of owners and bareboat charterers of arrested ships

52. The observer for IAPH said that the liability of the claimant in a case of wrongful arrest was not regulated by the provisions of the draft Convention. This was the case not only vis-à-vis the owner or bareboat charterer but also the Port Authority, who could well suffer considerable economic loss arising out of immobilization of an arrested ship when the owner, bareboat charterer or arrestor went into liquidation. This situation could also seriously affect other port users. He stressed the importance for the Convention to address these issues and said that port authorities should be associated with the competent judicial authority ordering the arrest of a ship in order to examine the consequences and modalities of the arrest, such as the need for unloading dangerous cargo, transferring the ship to a waiting safe berth, etc. The Convention should provide for appropriate security to be requested from the claimant who sought arrest in order to cover ordinary port dues and expenses.

Article 7: Jurisdiction on the merits of the case

53. No comments.

Article 8: Application

54. In the view of one delegation, paragraph 3 of this article should be either an independent article or form part of article 3.

Article 9: Reservations

55. No comments.

Annex II

DRAFT ARTICLES FOR A CONVENTION ON ARREST OF SHIPS 1/

Article 1

Definitions

(1) "Maritime claim" means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or an "hypothèque" or a charge of the same nature on any ship, or out of salvage operations relating to any ship, such as any claim in respect of:

(a) physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel; (1993 MLM Convention, article 4 (1) (e));

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel; (1993 MLM Convention, article 4 (1) (b));

(c) [salvage operations or any salvage agreement;] [reward for the salvage of the vessel;];

(d) liability to pay compensation or other remuneration in respect of the removal or attempted removal of a threat of damage, or of preventive measures or similar operations, whether or not arising under any international convention, or any enactment or agreement;

(e) costs or expenses relating to the raising, removal, recovery or destruction of the wreck of the ship or her cargo;

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers in the ship, whether contained in a charter party or otherwise;

(h) loss of or damage to or in connection with goods (including luggage) carried in the ship;

(i) general average;

(j) towage;

(k) pilotage;

1/ Originally issued in document TD/B/CN.4/GE.2/CRP.1.

(l) goods, materials, provisions, bunkers, equipment (including containers) or services supplied to the ship for her operation or maintenance;

(m) construction, repair, converting or equipping of the ship;

(n) port, canal, and other waterway dues and pilotage dues; (1993 MLM Convention, article 4 (1) (d))

(o) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf; (1993 MLM Convention, article 4 (1) (a))

(p) disbursements made in respect of the ship, by or on behalf of the master, owner, bareboat or other charterer or agent;

(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or bareboat charterer;

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or bareboat charterer;

(s) any dispute as to ownership or possession of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a mortgage or an "hypothèque" or a charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship.

(2) "Arrest" means any detention, or restriction on removal, of a ship by order of a Court to secure a maritime claim when at the time of such detention or restriction that ship is physically within the jurisdiction of the State where the order has been made.

"Arrest" includes "attachment" or other conservatory measures, but does not include measures taken in execution or satisfaction of an enforceable judgement or arbitral award.

(3) "Person" includes individuals, partnerships, unincorporated associations and bodies corporate, governments, their departments and public authorities.

(4) "Claimant" means any person asserting a maritime claim.

(5) "Court" means any competent judicial authority of a State.

Article 2

Powers of arrest

(1) A ship may be arrested or released from arrest only by or under the authority of a Court of the State in which the arrest is demanded or has been effected.

(2) A ship may be arrested in respect of a maritime claim but in respect of no other claim.

(3) A ship may be arrested even though she is ready to sail or is sailing.

(4) A ship may be arrested for the purpose of obtaining security notwithstanding that by virtue of a jurisdiction clause, arbitration clause or choice of law clause in any relevant contract the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

(5) Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or her release shall be governed by the law of the State in which the arrest is demanded or has been effected.

Article 3

Exercise of right of arrest

(1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the claim is secured by a maritime lien and is within any of the following categories: (1993 MLM Convention, article 4 (1))

(i) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf,

(ii) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel,

(iii) reward for the salvage of the vessel,

(iv) port, canal, and other waterway dues and pilotage dues,

(v) physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel; or

(b) the claim is based upon a registered mortgage or a registered "hypothèque" or a registered charge of the same nature; or

(c) the claim is related to ownership or possession of the ship; or

(d) the claim is not covered by (a), (b) or (c) above and if:

(i) the person who owned the ship at the time when the maritime claim arose is personally liable for the claim and is owner of the ship when the arrest is effected, or

(ii) the bareboat charterer of the ship is personally liable for the claim and is bareboat charterer or owner of the ship when the arrest is effected.

(2) Arrest is [also]* permissible of any [other]* ship or ships which, when the arrest is effected, is or are owned by the person who is personally liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) bareboat charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article, the arrest of a ship which is not owned by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is demanded, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4

Release from arrest

(1) A ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form.

(2) In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the ship.

(3) Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

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* Proposal by the delegation of the United States of America.

(4) (a) If a ship has been arrested in a non-party State and is not released although security has been given in a State party, that security shall be ordered released on application to the Court in the State party save in exceptional cases where it would be unjust to do so.

(b) If in a non-party State the ship is released upon satisfactory security being provided, any security given in a State party shall be ordered released to the extent that the total amount of security given in the two States exceeds:

(i) the claim for which the ship has been arrested, or

(ii) the value of the ship,

whichever is the lower.

Such release shall, however, not be ordered unless the security given in the non-party State will actually be available to the claimant and will be freely transferable.

(5) Where pursuant to paragraph (1) of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 5

Right of rearrest and multiple arrest

[(1) Where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate, provided that the aggregate amount of security may not exceed the value of the ship; or

(b) the person who has already given the security is not, or is unlikely to be, able to fulfil some or all of his obligations; or

(c) the ship arrested or the security previously given was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release.

(2) Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate; or

(b) the provisions of paragraph (1) (b) or (c) of this article are applicable.

(3) "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.]

Article 6

Protection of owners and bareboat charterers of arrested ships

(1) The court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and obtained.

(2) The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified, or

(b) excessive security having been demanded and obtained.

(3) The liability, if any, of the claimant in accordance with paragraph (2) of this article shall be determined by application of the law of the State where the arrest was effected.

(4) If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph (2) of this article may be stayed pending that decision.

(5) Where pursuant to paragraph (1) of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7

Jurisdiction on the merits of the case

(1) The Courts of the State in which an arrest has been effected or security given to prevent arrest or obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

(2) Notwithstanding the provisions of paragraph (1) of this article, the Courts of the State in which an arrest has been effected, or security given to prevent arrest or obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

(3) In cases where a Court of the State where an arrest has been effected or security given to prevent arrest or obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph (2) of this article,

such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

(4) If proceedings are not brought within the period of time ordered in accordance with paragraph (3) of this article then the ship arrested or the security given shall, upon request, be ordered released.

(5) If proceedings are brought within the period of time ordered in accordance with paragraph (3) of this article, or if proceedings before a competent Court in another State are brought in the absence of any such order, then unless such proceedings do not satisfy general requirements in respect of due process of law, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security given in order to prevent her arrest or obtain her release.

(6) Nothing contained in the provisions of paragraph (5) of this article shall restrict any further effect given to a foreign judgement or arbitral award under the law of the State where the arrest of the ship was made or security given to prevent her arrest or obtain her release.

Article 8

Application

(1) This Convention shall apply to any seagoing ship, whether or not that ship is flying the flag of a State party.

(2) The Convention shall not apply to ships owned or operated by a State used only on governmental non-commercial service. (See 1993 MLM Convention, article 13 (2))

(3) Nothing in this Convention shall be construed as creating a maritime lien.

(4) This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

(5) This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

(6) Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

(7) Nothing in this Convention shall modify or affect the rules of law in force in the States parties relating to the arrest of any ship physically within the jurisdiction of the State of her flag procured by a person who has his habitual residence or principal place of business in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9

Reservations

A State may, when signing, ratifying, accepting or acceding to this Convention, reserve the right to refrain from applying the Convention to ships not flying the flag of a State party.

Annex III

PROVISIONAL AGENDA FOR THE EIGHTH SESSION OF THE JOINT INTERGOVERNMENTAL GROUP OF EXPERTS

1. Election of officers

2. Adoption of the agenda and organization of work

3. Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

4. Provisional agenda and date of the next session

5. Other business

6. Adoption of the report of the eighth session

Annex IV

ATTENDANCE 1/

1. The following States were represented at the session:

Algeria
Argentina
Australia
Bahrain
Belgium
Benin
Brazil
Canada
China
Costa Rica
Côte d'Ivoire
Cuba
Egypt
Finland
France
Gabon
Gambia
Germany
Greece
Guinea
Honduras
Indonesia
Iran (Islamic Republic of)
Ireland
Italy
Japan
Liberia
Libyan Arab Jamahiriya
Malaysia
Mexico
Morocco
Netherlands
Nigeria
Norway
Oman
Pakistan
Paraguay
Poland
Portugal
Republic of Korea
Russian Federation
Saudi Arabia
Spain
Sweden
Switzerland
Thailand
Trinidad and Tobago
Tunisia
Turkey
Ukraine
United Kingdom of Great Britain and Northern Ireland
United States of America
Yemen

2. The following international organization was represented at the session:

The General Agreement on Tariffs and Trade

3. The following intergovernmental organization was represented at the session:

Organization of African Unity

4. The following non-governmental organizations were represented at the session:

General Category

International Chamber of Commerce
International Confederation of Free Trade Unions.

1/ For the list of participants, see TD/B/CN.4/GE.2/INF.1.

Special Category

Comité maritime international
Ibero-American Institute of Maritime Law
Institute of International Container Lessors
International Association of Classification Societies
International Association of Ports and Harbours
International Chamber of Shipping
International Ship Suppliers Association.